within any period which would not preclude all reasonable expectation that the promise might be kept, and it is for the jury to say whether the defect was such that none but a reckless servant, utterly careless of his safety, would have used the defective machinery. If, under all the circumstances and in view of the promise, the servant is not wanting in due care in continuing to use the defective machinery, then the master is liable, because the servant may rely upon the promise to repair, and the master is responsible for the consequences that may be reasonably expected to result under ordinary circumstances from his misconduct: citing *Rigby* v. *Hewitt*, 5 Exch. 243; *Hoey* v. *Felton*, 11 C. B. N. S. 143; *Senior* v. *Ward*, 1 E. & E. 385.

Another author (Cooley on Torts), after stating this rule, states that after making the promise to repair the duty of the master is manifest and imperative that he must remove the danger, and he is not in the exercise of ordinary care unless and until he makes his promise good, and the promise removes all ground for the argument that the servant by continuing in the employment engages to assume its risks, the implication being rebutted by the promise to repair. See *Railroad Co.* v. *Gildersleeve*, 33 Mich. 133.

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[The question how far the master's liability is affected by the fact that the failure to remedy the defect in the machinery was due to the negligence of a co-employee has been discussed in several recent cases. See *Wilson* v. *Merry*, L. R., 1 Sc. & D. Ap. C. 326; *Holden* v. *Fitchburg Railroad Co.*, 129 Mass. 268; 2 Am. and Eng. R. R. Cases 94, and note; *Davis* v. *Railroad Co.* to appear in 55 Vt. 84; and *Mulvey* v. *R. I. Locomotive Works*, to appear in 14 R. I. 52. Abstracts of the last two cases will be found at the end of this number.—ED.]

United States District Court, Western District of Pennsylvania.

THE GENEVA.

The power to erect wharves and charge wharfage is not one of the implied powers of a municipality, but requires for its exercise an express legislative grant.

Such power is not deducible from an authority to regulate streets, lanes and alleys, and to make laws and regulations for the good order and government of the municipality.

Where a municipal corporation is a riparian proprietor it may charge wharfage, but not if the wharf extends beyond low-water line, and is principally constructed on the line of a public street.

IN Admiralty—Libel for wharfage.

J. M. Nevin, for libellant.

D. T. Watson, for respondents.

The opinion of the court was delivered by

ACHESON, J.—The borough of Elizabeth claims the right to charge wharfage—First, under legislative authority; and, secondly, by virtue of riparian proprietorship. Let us briefly examine the grounds of the claim in the order stated.

1. It is not pretended that the borough charter confers any express authority to construct a wharf and exact tolls or wharfage for its use. Implied authority is all that is asserted, and this must be derived either from the powers granted in respect to highways or the general power to enact laws for the government of the borough. The original act of incorporation authorized the town council to appoint officers for "regulating the streets, lanes and alleys," and by the act of 1851 the borough authorities are empowered "to survey, lay out, enact and ordain such roads, streets, lanes, alleys, courts and common sewers as they may deem necessary; and to regulate the roads, streets, lanes, alleys, courts, common sewers, public squares, common grounds, footwalks, pavements, gutters, culverts and drains, and the heights, grades, widths, slopes and forms thereof; and they shall have all other needful jurisdiction over the same."

Under a substantially similar grant of power the Supreme Court of Indiana, in *Snyder* v. *Rockport*, 6 Ind. 237, held that the municipality was not authorized to construct a wharf. But if it be conceded that the borough of Elizabeth might lawfully construct a wharf at the river terminus of a street, it by no means follows that the borough can charge wharfage for its use, any more than it can exact tolls for the use of any other public highway.

In respect to municipal affairs generally, the council is empowered to make "laws, ordinances, by-laws and regulations" for the good order and government of the borough, subject to the express restriction that they shall not be repugnant to, or inconsistent with, the laws of the Commonwealth.

The question first to be decided is whether, from the express powers above recited, the borough of Elizabeth can rightfully deduce a legislative grant of the franchise to charge wharfage. In his work on Municipal Corporations, § 67, (2d ed.,) Mr. Dillon classes the authority to erect wharves and charge wharfage among "the powers of a special and extra-municipal nature." In this view he is fully sustained by the adjudged cases: *The Wharf Case*, 3 Bland. Ch. 361; *People* v. *Broadway Wharf Co.*, 31 Cal. 33. It was declared in the *Wharf Case*, *supra*, 384, that, except by express legislative allowance, the "public wharves [of Baltimore] are no more liable to wharfage than any one of the streets of the city are subject to toll." In the case of *The Empire State*, 1 Newb. Adm. 541, it was held that while the authorities of the city of Detroit might erect wharves at the *termini* of their streets, suitable for

landings, such erections became free to the public as extensions of the streets, and the city had no authority to exact toll for ingress or egress. In *St. Martinsville* v. *The Mary Lewis*, 32 La. Ann. 1293–95, the court decide against the right of the municipality to erect wharves and charge wharfage, and say: "The power to exact tolls is a restraint upon the freedom of navigation, and is liable to abuse; and the corporation seeking to enforce such exaction must present a clear legislative authority for the purpose."

This precise question, so far as I know, has never been considered by the Supreme Court of Pennsylvania; but in *Huntington, etc., Turnpike Co.* v. *Brown*, 2 P. & W. 462, 464, that court, treating of the subject of tolls collectible by a turnpike company, after declaring turnpike roads to be public highways, say: "And it is the franchise of the citizen to use them free of every restriction that is not explicitly imposed by the legislature."

In *Perrine* v. *Chesapeake & D. Canal Co.*, 9 How. 172, the Supreme Court of the United States applied the same doctrine to a canal built by an incorporated company. The principle is undoubtedly applicable to a public wharf, for when a highway upon the land connects with a public river, to pass from the one highway to the other is a public common right: *Fowler* v. *Mott*, 19 Barb. 204. That it is competent for the legislature of a state to authorize a municipal corporation to demand tolls from those engaged in commerce for the use of a public wharf is settled; but the privilege being in derogation of common right, the municipality claiming it must show a plain legislative grant of the franchise. I am of opinion that the borough of Elizabeth has not been invested by the legislature with such authority.

2. But where a municipal corporation is a riparian proprietor, its right to charge wharfage has been judicially recognised: *Murphy* v. *City of Montgomery*, 11 Ala. 586–589; Dillon, Mun. Corp. § 72; *Cannon* v. *New Orleans*, 20 Wall. 577. The second inquiry, therefore, is whether upon this ground the claim of the borough can be sustained.

The wharf at Elizabeth was constructed by the borough in 1847 or 1848, and the cost defrayed, in part, out of borough funds, and in part by private subscriptions. It is located at the foot or mouth of Market street, which street, the evidence shows, extends to the Monongahela river. Mr. Diehl, who was a member of the town council when the wharf was built, and chairman of the construction

committee, testifies that Market street at this place is 60 feet in width. He also states that at the river bluff the wharf is about 60 feet wide, and at low-water line it is from 80 to 100 feet in width. The wharf is constructed on Market street, a public highway, and on ground on either side, which the Messrs. Walker claimed, and which they agreed the borough might take for the wharf. These strips of ground so given by the Walkers, respectively, cannot exceed 20 feet in width, and probably are considerably less. They were a contribution to the wharf by the Walkers in lieu of a money subscription. If they ever executed a deed to the borough it has not been produced, or its contents proved. In this connection it is but proper to state that there is evidence that before the construction of the wharf all the ground within its lines was freely used by the public. It is further shown that along its entire water front the wharf extends out into the river at least from 10 to 15 feet beyond the low-water line.

From the established facts my conclusion is that the claim of the borough to wharfage, based on its alleged riparian ownership, cannot be maintained. The only part of the land embraced in the wharf, to which the borough can assert any sort of title, is the two narrow strips on either side of Market street donated by the Walkers. But, under the proofs, that transaction looks to me like a simple dedication of the ground by the Walkers to the public for the purpose of a wharf. But if not, and the borough is invested with the ownership, this fact, it seems to me, is insufficient to sustain the claim of the borough, for several reasons: First, it is the settled law of Pennsylvania that on navigable streams, such as the Monongahela river, the title of the riparian owner extends only to the ordinary low-water line: *Wainwright* v. *McCullough*, 60 Penn. St. 66; *Poor* v. *McClure*, 77 Id. 214. The title to the bed of the river is in the Commonwealth for the use of the whole community, (Id.,) and the riparian owner has no right to erect a wharf beyond low-water mark (*Naglee* v. *Ingersoll*, 7 Penn. St. 185, 201; *Tinicum Fishing Co.* v. *Carter*, 61 Id. 31); and the title to the structure so located follows the title to the bed of the river: Id. In the second place, the wharf in the main is constructed upon the public street, and the incorporation into it by the borough of the two small pieces of ground in question does not deprive the wharf of its public character. *Accessorium non ducit sed sequitur suum principale.* Finally, the steamboat Geneva merely touched at the wharf to receive or

discharge passengers and cargo, and it is not affirmatively shown that she used anything but the mouth of the street.

Let a decree be drawn dismissing the libel, with costs.

A structure of stone, timber or earth erected upon the shore of a harbor, river, or other navigable water, for the convenience of loading and unloading vessels, is called a wharf; when it projects into the water it is a pier, and when there is no particular artificial structure but the mere natural bank it is generally known as a landing. Any construction of timber or stone upon the bank of a non-tidal stream, of such shape that a vessel may lay alongside of it with its broadside to the shore, is a wharf, as is also a paved street extending to the water's edge and used by vessels as a place for receiving and discharging freight: *City of Keokuk* v. *The Keokuk N. L. P. Co.*, 45 Iowa 196; *Gieger* v. *Filor*, 8 Fla. 325.

In this note we propose to consider some of the general questions growing out of the construction and management of wharves.

I. Wharves and landing-places may be private or public, although the property may be in an individual owner. In other words, the owner may have the right to the exclusive enjoyment of the structure and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels, upon payment of a reasonable compensation as wharfage. Whether a wharf is public or private will depend, in case of dispute, upon several considerations, involving the purpose for which it was built, the use to which it has been applied, the place where located, and the nature and character of the structure. Undoubtedly a riparian owner may construct such improvement for his own exclusive use and benefit. And where it is not erected and located in a harbor, or other usual resting place for vessels, and is confined within the shore of the sea, or the navigable waters of the lake, and has never been used by others, or held out as intended for such use, no implication arises that the owner has ever given his consent to the use of such wharf by the public. *Dutton* v. *Strong*, 1 Black 23. Nor will the mere fact that the owner allows others to use his wharf amount to a dedication of it to the public. *O'Neill* v. *Annett*, 27 N. J. L. 290. The right to the exclusive use of a wharf by an individual does not depend upon whether it is constructed above or below low-water mark, or whether the shore is or is not *publici juris*, but solely upon the question whether in fact and in law the title to the wharf is vested in the individual, no matter how that title may have been acquired. *O'Neill* v. *Annet*, *supra*.

At common law no one has the right to land goods upon the land of another on the bank of a navigable river without the owner's consent, except in cases of necessity or danger. Mr. Justice HOLROYD, in *Blundell* v. *Catterall*, 5 B. & A. 268, says: "It is not by the common law, nor is it by statute, lawful to come with, or land or ship, customable goods, in creeks or havens, or other places out of the ports, unless in cases of danger or necessity; nor fish, nor land other goods not customable, where the shore or land adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof." And to the same effect see *Chambers* v. *Furry*, 1 Yeates 167; *Ball* v. *Slack*, 2 Whart. 508; *Cooper* v. *Smith*, 9 S. & R. 26.

When, however, a wharf is constructed and thrown open to the use of the public, this act, like keeping an inn, confers a general license on all persons to occupy it for all lawful purposes; when such is the case, it is not necessary

to make an express application for the privilege of using it for the purpose for which it was evidently erected. The mind of the owner is presumed to assent to such use: *Heaney* v. *Heeney*, 2 Denio 625; *Lansing* v. *Smith*, 4 Wend. 9; *Dutton* v. *Strong*, 1 Black 23, distinguished from *Heaney* v. *Heeney*, *supra*.

II. There is much conflict among the decisions as to the extent of the rights of riparian proprietors. At common law, the right in the soil between high and low water mark was in the king: Angell on Tide Waters 180. And in some of the United States the same doctrine prevails—thus giving the paramount right to the public. But our purpose at present is not to consider the rights of riparian owners further than the right to construct wharves. This right is generally recognised as being inherent in the owner of the land. Independent of statutory restrictions, the establishment of a wharf on land bordering upon tide-water, lakes or navigable rivers, by the owner thereof, is a lawful use of the land. This right exists as an incident to proprietorship and independent of special legislative authority, but it terminates at the point of navigability. He must exercise his right so as not to interfere with the rights of others, and the right of navigation is a public paramount right which must not be obstructed: *Commonwealth* v. *Crowninshield*, 2 Dane's Abr. 696; *East Haven* v. *Hemingway*, 7 Conn. 186; *Simons* v. *French*, 25 Conn. 346; *Bell* v. *Gough*, 23 N. J. L. 624; *Kean* v. *Stetson*, 5 Pick. 492; *State* v. *Wilson*, 42 Me. 9; *Wetmore* v. *Atlantic White Lead Co.*, 37 Barb. 70; *Stevens* v. *Paterson, &c., R. R. Co.*, 34 N. J. L. 532; s. c. 14 Am. R. 707; *Bainbridge* v. *Sherlock*, 29 Ind. 364; s. c. 41 Id. 35; s. c. 13 Am. R. 302; *Rice* v. *Puddiman*, 10 Mich. 125; *Lorman* v. *Benson*, 8 Id. 18; *Yates* v. *Milwaukee*, 10 Wall. 497; *Grant* v. *City of Davenport*, 18 Iowa 179; *Ensminger* v. *People*, 47 Ill. 384; *Chicago* v. *Laflin*, 49 Ill. 172; *Heaney* v. *Heeney*, 2 Denio 625; *Thornton* v. *Grant*, 10 R. I. 477; s. c. 14 Am. R. 701; *Dutton* v. *Strong*, 1 Black 23; *Railroad Co.* v. *Schurmier*, 7 Wall. 272; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *City of Galveston* v. *Mesnard*, 23 Texas 349, 407; *Irwin* v. *Dixon*, 9 How. 10. And see generally, *Lay* v. *King*, 5 Day 72; *Commonwealth* v. *Shaw*, 14 S. & R. 9; *Bowman* v. *Wathen*, 2 McLean C. C. 376; *Bell* v. *Hull, &c., R. R. Co.*, 6 M. & W. 699; *Wilson* v. *Inloes*, 11 G. & J. 351; *Fleet* v. *Hegeman*, 14 Wend. 42; *Wheeling Bridge Case*, 13 How. 519; *Gilman* v. *Philadelphia*, 3 Wall. 713; *O'Niell* v. *Annett*, 3 Dutch. 290; *Fitchburg Railroad Co.* v. *Boston, &c., Co.*, 3 Cush. 58; *Keyport Steamboat Co.* v. *Farmer Trans. Co.*, 18 N. J. Eq. 516; *Storer* v. *Freeman*, 6 Mass. 435; *Sale* v. *Pratt*, 19 Pick. 191; *Austin* v. *Carter*, 1 Mass. 231; *Commonwealth* v. *Charleston*, 1 Pick. 180; *Parkman* v. *Welch*, 19 Id. 235; *Ingraham* v. *Wilkinson*, 4 Id. 268; *Lapish* v. *Bangor Bank*, 8 Greenl. 85; *Moore* v. *Griffin*, 9 Shep. 350; *Burrows* v. *Gallup*, 32 Conn. 493; *Chapman* v. *Kimball*, 9 Id. 138.

In some states, the right of the riparian owner extends only to high water mark, and all below that belongs to the state. But the upland proprietor is allowed to have an inchoate right, either with or without a license, to acquire an exclusive right to the use of the lowland by erecting a wharf or otherwise improving the landing. Such improvement, however, gives him no property in the land under the water. At any time before it is reclaimed by the upland proprietor and thus annexed to his land, it may be granted by the state to a stranger: *Wetmore* v. *Brooklyn Gas Co.*, 42 N. Y. 384; *Ledyard* v. *Ten Eyke*, 36 Barb. 102; *State* v. *Jersey City*, 25 N. J. L. 530. See *Simpson* v. *Neill*, 89 Pa. St. 183.

In *Grant* v. *City of Davenport*, 18 Iowa 179, 192, Chief Justice WRIGHT

observed: "In thus holding, it must be borne in mind that this wharf does not interrupt nor interfere with the free navigation of the river. On the contrary, it rather assists than obstructs it. * * * We entertain no doubt as to the right of the riparian proprietor (outside of any incorporated city or town), to erect wharves or landing-places on the shores of navigable rivers if they conform to state legislations (if any), and do not obstruct the paramount right of navigation. The right is expressly recognised in *Dutton* v. *Strong*, 1 Black 23, and we can find no case to the contrary. If the proprietor's land is within the limits of an incorporated town or city, this right must yield to the paramount right (when the right is given by the law of its creation) of the corporation to build, erect and regulate the wharves and landings:" *Attorney-General* v. *Richards*, 2 Anstr. 603; *Attorney-General* v. *Philpot*, 2 Id. 607; *Attorney-General* v. *Cleaver*, 18 Ves. Jr., 218; *Rex* v. *Ward*, 4 A. & E. 384; *Rex* v. *Russell*, 6 B. & C. 566; *Attorney-General* v. *Parmeter*, 10 Price 379; *Attorney-General* v. *Burridge*, 10 Id. 350; *Attorney-General* v. *Forbes*, 2 Myl. & Cr. 123; *Ripon* v. *Hobart*, 3 Myl. & K. 169; *Mohawk Bridge Co.* v. *Utica, &c., Co.*, 6 Paige 554; *Attorney-General* v. *Cohoes*, 6 Id. 133; *Commissioners* v. *Wright*, 6 Am. Jur. 185, and cases cited above.

Thus, it is seen that the right to construct a wharf on navigable water is subject to the condition that it must not obstruct the paramount right of navigation. If it interferes with navigation, it is a nuisance, but the fact must be shown and will not be presumed. A wharf, even in navigable water, is not a nuisance *per se*: *Dutton* v. *Strong*, 1 Black 23; *Rex* v. *Grosvenor*, 2 Starkie 448; *Rex* v. *Russell*, 6 B. & C. 566; *Rex* v. *Ward*, 4 A. & E. 384; *Rex* v. *Morris*, 1 B. & A. 441; *Reg.* v. *Betts*, 16 Q. B. 1022; *Reg.* v. *Tindall*, 6 A. & E. 143, affirmed in *Reg.* v. *Russell*, 3 3 E. & B. 942; *Reg.* v. *Randall*, 1 Car. & M. 496.

"The doctrine of these cases," says Mr. Justice DURFEE, "is that the erection of a wharf in tide-water is not a nuisance if the navigation is not injured by the erection. If, however, we inquire what is the degree of obstruction which, in contemplation of law, amounts to an injury to navigation, the cases do not furnish an entirely satisfactory answer. In some of the cases, this question appears to have been left very much at large to the good sense of the jury; while in others, as in *Rex* v. *Grosvenor* and *Reg.* v. *Randall*, language was used which would seem to imply that almost any inconvenience to navigation would constitute an indictable nuisance." See *Folke* v. *Chad*, 3 Doug. (Eng.) 340; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339; *Gann* v. *The F. F. & W.*, 11 H. of L. Cas. 192.

Any permanent structure which interferes with, endangers or obstructs navigation is a nuisance. Such obstructions are unlawful, and no considerations of convenience or utility will justify them: *Wis. Imp. Co.* v. *Lyons*, 30 Wis. 61; *Packet Co.* v. *Atlee*, 2 Dillon C. C. 479. But it must be in fact a nuisance, and not merely so declared by a city council. "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or state within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities:" *Yates* v. *Milwaukee*, 10 Wall. 497. "In all incorporated towns or cities located on navigable waters," says Mr. Justice MILLER, in *Atlee* v. *Packet Co.*, 21 Wall. 389, "there is in their charters or in

some general statute of the state, either express or implied, power for the establishment and regulation of these landings. This may be done by the legislature of the state, or by authority, express or implied, delegated to the local municipal government. In all such cases there is exercised a control over the location, erection and use of such wharves or landings which will prevent their being made obstructions to navigation and standing menaces of danger. The wharves or piers are generally located by lines bearing such relation to the shore and to the navigable waters as to prevent danger to vessels using the river, and the control which the state exercises over them is such as to secure at once their usefulness and safety. These obstructions are also allowable in a part of the water which could be used for navigation, on the ground that they are essential aids to navigation itself. (But see same case, 2 Dillon C. C. 479.) The navigable streams of the country would be of little value for that purpose if they had no places where the vessels they floated could land, with conveniences for receiving and discharging cargoes, for lying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect, they must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they use them and are lashed to their sides. They must, of necessity, occupy a part of the stream over which a vessel could float if they were not there:" *Bainbridge* v. *Sherlock*, 29 Ind. 364, and see the same case as modified in 41 Id. 35.

This right of the riparian proprietor to the use of his water-front excludes all others from erecting wharves or other improvements for the benefit of commerce between high and low-water mark. Such a structure would have to rest upon the land of the riparian owner, and would be inconsistent with his rights: *Hagan* v. *Campbell*, 8 Porter 9; *People* *Davidson*, 30 Cal. 379. If a private party erects a wharf upon land belonging to a city, he can have no rights in it except such as belong to the public at large. Possession of the wharf can, in such a case, be recovered in ejectment, and thereafter it can be managed by the city according to its own views of public policy: *People* v. *Davidson*, 30 Cal. 379; *Walker* v. *State Harbor Commissioners*, 17 Wall. 648; *Packet Co.* v. *Atlee*, 2 Dillon C. C. 479.

If a municipality is a riparian owner it has the same power to erect and control wharves as a private owner. Thus, the city of Boston was held to have the same rights as other littoral proprietors, and not to have dedicated a dock which it owned to the public by merely abstaining from any control over it. "The people of Boston who owned the land as their common and private property, acted through a corporation, whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit, cannot be called a dedication of it to any other public or wider extent. Whether it was called 'town dock' or 'public dock' (which were used as synonymous terms), would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city:" *Boston* v. *Lecraw*, 17 How. 426; *Commonwealth* v. *Roxbury*, 9 Gray 514, 519, and note.

The general powers which municipal corporations possess over wharves are derived from the legislature: *Snyder* v. *Rockport*, 6 Md. 237; *Railroad Co.* v. *Winthrop*, 5 La. Ann. 36; *State* v. *Jersey City*, 25 N. J. L. 31. This author-

ity to erect wharves and charge compensation for keeping them and their approaches in a safe condition, is one of the special powers conferred by the legislature upon municipalities bordering upon navigable water: *Commonwealth* v. *Alger*, 7 Cush. 53, 82; *Municipality* v. *Pease*, 2 La. Ann. 538; *Pollard's Lessees* v. *Hagan*, 3 How. 212; *Worsley* v. *Municipality*, 9 Rob. (La.) 324; *The Wharf Case*, 3 Bland's Ch. 383; *Illinois, &c., Co.* v. *St. Louis*, 2 Dillon C. C. 70; *New Orleans* v. *United States*, 10 Pet. 662, 735; *Barney* v. *Keokuk*, 94 U. S. 324; *Weber* v. *Harbor Commissioners*, 11 Wall. 57; *Pacific Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100 Id. 430. And it may make them the depositaries of it in such a measure as it deems expedient: *Fuller* v. *Edings*, 11 Rich. L. (S. C.) 239; *Waddingham* v. *St. Louis*, 14 Mo. 190; *Baltimore* v. *White*, 3 Gill. 444; *Weber* v. *Harbor Commissioners*, 18 Wall. 57. Hence, unless expressly empowered by its charter to erect a wharf, a municipality cannot do so as an independent undertaking. But it will not be prevented from grading its streets merely because the river end of one will be used as a wharf. It has the right to improve the street by grading it down to the river, and if in doing this in the manner pointed out by law, a wharf and steamboat landing results, it would be perfectly legal, and a peculiarly fortunate incident to the town:" *Snyder* v. *Rockport*, 6 Ind. 237.

Where a city charter provides that it "shall have control of the landing, wharfage and dockage of boats," it may establish and construct wharves and collect a reasonable compensation for their use. The intention to charge for its use must be expressed in some manner, either by ordinance or otherwise. Such a wharf will be presumed to be for the benefit of the public, like the paving of a street or other such improvement. Municipalities have different relations from those of individual riparian proprietors. In case the latter erected a wharf, the presumption might be that he intended to charge for the use of it. He has no public duties to perform, but acts solely in an individual capacity. But it is otherwise with public corporations. As a general rule, they act in a public capacity and for a public purpose: *Muscatine* v. *Keokuk Northern L. P. Co.*, 45 Iowa 185.

Where a city is authorized by its charter to establish and regulate the use of wharves, fix the rate of wharfage and regulate the anchorage and mooring of boats and rafts, it may, by ordinances, prohibit others from using any place other than the established wharf, without the permission of the city and payment of the ordinary wharfage fee. The power to prohibit the establishment of other wharves or landings is a necessary part of the power to erect and regulate: *City of Dubuque* v. *Stout*, 32 Iowa 80.

So power to erect wharves includes the power to condemn private property for that purpose. It is held in Iowa that a railway company may, with the consent of the municipal authorities, lay its track in the streets of the city, whether the fee is in the city or the adjoining proprietor; *Milburn* v. *Cedar Rapids*, 12 Iowa 249; *Clinton* v. *C. R. & M. R. R. Co.*, 24 Iowa 455; *Tomlin* v. *D. B. & M. R. R. Co.*, 32 Iowa 106; *C. N. & S. R. R. Co.* v. *Newton*, 36 Iowa 299; *Cook* v. *Burlington*, 36 Id. 357; *Clinton* v. *C. & L. R. R. Co.*, 37 Id. 61; *Ingram* v. *C. D. & M. R. R. Co.*, 38 Id. 669; and the Supreme Court of the United States, following the general rule that it should adopt the construction put upon such statutes by the state courts (*Braney* v. *Keokuk*, 4 Dillon C. C. 593; *Suydam* v. *Williamson*, 24 How. 427; *Leffingwell* v. *Warren*, 2 Black 599; *Christy* v. *Pridgeon*, 4 Wall. 196; *Nichols* v. *Levy*, 5 Id. 433; *Shipp* v. *Miller's Heirs*, 2 Wheat. 316; *Jackson* v. *Chew*, 12 Id. 162; *Swift* v. *Tyson*, 16 Peters 17), have held that a municipality may, in

that state, authorize a steamboat company to erect a building for the receipt and shipment of merchandise, on or near the banks of a river in front of private lots, reserving municipal and public control over such structure: *Barney* v. *Keokuk*, 4 Dillon C. C. 593, affirmed in 94 U. S. 324. Power to erect a wharf and condemn private property therefor, includes power to extend a wharf already in existence, and to appropriate the necessary land for that purpose upon making proper compensation to the owner: *Hannibal* v. *Winchell*, 54 Mo. 172.

III. By virtue of its general power, the legislature may grant to an individual the exclusive right to erect and keep a public toll wharf within certain prescribed limits; such a grant is not in conflict with a clause in the constitution of the state providing "that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community, but in consideration of public services." It will be presumed to be in consideration of public services, as it is beneficial to the public: *Martin* v. *O'Brien*, 34 Miss. 21; *Charles River Bridge Co.* v. *Warren Bridge*, 11 Pet. 420.

Navigable waters and their shores are primarily under the control of the United States, and state legislation, to be valid, must be in conformity with the laws passed by Congress for the regulation of commerce. But state laws regulating harbors, when not in direct conflict with the federal constitution or legislature, are valid: *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Cooley* v. *Board of Wardens*, 12 How. 296; *Pollard's Lessees* v. *Hagan*, 3 How. 212; *Cisco* v. *Roberts*, 36 N. Y. 292; *Port Wardens* v. *Pratt*, 10 Rob. (La.) 459; *Chapman* v. *Miller*, 2 Spear's Law 769; *Alexander* v. *R. R. Co.*, 3 Strob. (S. C.) Law 594; *State* v. *City Counsel*, 4 Rich. Law 286; *Commonwealth* v. *Alger*, 7 Cush. 53; *Jeffersonville* v. *Ferry Boat*, 35 Ind. 19; *Harbor Master* v. *Southerland*, 47 Ala. 511. But any law which imposes a duty or tonnage is a regulation of commerce and void; *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Co.* v. *St. Paul*, 3 Dillon C. C. 454; *Peete* v. *Morgan*, 19 Wall. 581; *Steamboat Co.* v. *Port Wardens*, 6 Id. 31. But a statute fixing a reasonable rate of compensation to be paid to a wharfinger for the use of his wharf by a vessel moored thereto, is not a tax on tonnage or an impediment to commerce: *The Barge John M. Welch*, 9 Ben. 507. Nor is a regulation of wharfage by a municipality proportionate to the vessel's tonnage a violation of any provisions of the Federal Constitution: *Ellerman* v. *McMains*, 30 La. Ann. (Part II.) 190.

The right of a municipal corporation to regulate wharves may be either express or implied. Even when conferred in terms, the power must, like other powers, be construed somewhat strictly when it affects private rights. The power to *regulate* must not be construed as a power to destroy: *Grant* v. *City of Davenport*, 18 Iowa 179. Thus, it has been held that even where the corporation boundaries extend to low-water mark, and the charter gives express power to erect and occupy all wharves and levees within the corporate limits of the city, the corporation has no power to control the bank so as to compel the riparian owner, whose rights extend to low-water mark, to take out a license for his wharf-boat fastened to the shore of his own land and used for his own business: *McLaughlin* v. *Stevens*, 18 Ohio 94; *Muscatine* v. *Hershey*, 18 Iowa 39; *Martin* v. *Evansville*, 32 Ind. 85.

But it may refuse its consent to the construction of a wharf, or may grant it with such conditions, limitations and restrictions as it may deem most beneficial to the navigation and use of the part of the city. Thus, it may grant the privilege upon the condition that the exterior margin shall constitute a public wharf: *Baltimore* v. *White*, 2 Gill. 444.

The power to regulate public wharves gives no power over private wharves. Thus, where a charter provided for regulating wharfage "of all articles brought to public landings in the said district," a by-law levying a fine on any person or persons who "shall sell on any of the wharves or landings within the said district, any cord-wood, unless the same shall have been corded or measured by the proper corder," is, so far as it respects private wharves, invalid. "Their powers in this particular are limited by the act of incorporation to public landings, and their public estate. Their special authority respecting the authority of individuals must appear on the face of the proceedings to be strictly pursued:" *Commissioners* v. *Neil*, 3 Yeates 54.

In *Commonwealth* v. *Alger*, 7 Cush. 53, it was held, that the Commonwealth had power to establish lines in the harbor of Boston beyond which no wharf should be extended or maintained, and to declare a wharf erected beyond such lines a public nuisance, and that such a statute takes away the rights of the proprietors of flats in the harbor beyond the line, to build thereon even where such erections would in no manner interfere with navigation; that such statutes, although they provide for no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to public use without compensation to the owner. See *Hart* v. *Mayor*, &c., 9 Wend. 571; affirming 3 Paige 213; *Wetmore* v. *Brooklyn Gaslight Co.*, 42 N. Y. 384; *People* v. *Vanderbilt*, 26 Id. 287; s. c. 28 Id. 396; *Hagan* v. *Campbell*, 8 Port. 9; *Mobile* v. *Eslava*, 9 Id. 577; *Railroad Co.* v. *Winthrop*, 5 La. Ann. 36. But in *Yates* v. *Milwaukee*, 10 Wall. 498, Mr. Justice MILLER says: "We are of opinion that the city of Milwaukee cannot, by creating a mere artificial and imaginary dock-line, hundreds of feet away from the navigable parts of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose."

In *Illinois* v. *Canal Co.*, 2 Dillon C. C. 70, the question arose as to what were the proper uses to which a city could put a public wharf. The precise question in the case was whether under an ordinance not expressly prohibitory, the city could authorize the erection of a grain elevator thereon to facilitate the handling of grain at the wharf. In the course of an elaborate opinion, Judge DILLON says: "A wharf differs in many material respects from a street. The latter is primarily intended for the purposes of passage or travel, and any structure on it without legislative authority is a nuisance; but a wharf is intended to furnish conveniences for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which wares discharged from vessels or awaiting shipment may be deposited; and it would seem that structures or appliances of any kind intended, and which have the effect to facilitate the landing and preservation of merchandise arriving at the wharf, erected upon it under municipal authority, and remaining at all times subject to municipal control, would be lawful and within the purpose for which the wharf property was acquired or dedicated. We do not say that the municipal authorities could use the wharf property for mere warehouse purposes, though we have no doubt that it would be competent for them to erect or authorize the erection thereon of such structures for the receipt and shipment of goods by water, as they might deem expedient in order to promote the trade and commerce of the city. And we are clearly of opinion that the erection, under the sanction of the city, of an elevator to be used in handling of grain at the wharf, and at all times under the direction and control of the municipal authorities, is such a use of wharf property as does not fall

without the scope of dedication, and such a structure would not, therefore, be a public nuisance. We have not met with nor have the counsel cited any adjudication upon the precise point; and we have, therefore, been compelled to decide it upon principle, and have felt that it was due to the importance of the question to set forth our views, as we have done with considerable fulness." See *Belcher Sugar Refining Co.* v. *St. Louis G. E. Co.*, 10 Mo. App. 401.

But under the power to regulate, a city cannot surrender to private individuals the exclusive use of a wharf for a fixed period. Powers conferred upon municipal corporations for public purposes, cannot be delegated to others, or surrendered, or renounced. Such corporations may adopt by-laws, or make authorized contracts, but they have no power to enter into contracts or pass ordinances which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them at any time from performing their public duties: *Illinois, &c., Canal Co.* v. *St. Louis*, 2 Dillon C. C. 70; *Gale* v. *Kalamazoo*, 23 Mich. 344; *People's Railroad* v. *Memphis Railroad*, 10 Wall. 380; *Louisville City Railroad* v. *Louisville*, 8 Bush 415; *Brooklyn* v. *City Railroad Co.*, 47 N. Y. 475; *Milhau* v. *Sharp*, 27 Id. 611; *Presb. Church* v. *Mayor, &c.*, 5 Cowen 538; *Stuyvesant* v. *Mayor, &c.*, 7 Id. 588; *Saving Fund* v. *Philadelphia*, 31 Pa. St. 175; *Ex parte Mayor, &c., of Albany*, 23 Wend. 277; *Railroad Co.* v. *Mayor, &c.*, 1 Hill 562, 568; *Martin* v. *Mayor, &c.*, 1 Hill 548; *Goszler* v. *Georgetown*, 6 Wheat. 593; *State* v. *Graves*, 19 Md. 351, 373; *Branson* v. *Philadelphia*, 47 Pa. St. 329; *Dingman* v. *People*, 51 Ill. 277; *Brimmer* v. *Boston*, 102 Mass. 19; *Johnson* v. *Philadelphia*, 60 Pa. St. 445; *State* v. *Cincinnati Gas Co.*, 18 Ohio St. 262; *Jackson* v. *Bowman*, 39 Miss. 671; *Oakland* v. *Carpentier*, 13 Cal. 540; *Smith* v. *Morse*, 2 Id. 524; and see *Attorney-General* v. *Mayor, &c.*, 3 Duer 119, 131, 534; *Davis* v. *Mayor, &c.*, 14 N. Y. 506; *Costar* v. *Brush*, 26 Wend. 628; Cooley's Const. Lim. 206.

IV. The right to erect a wharf carries with it a reasonable compensation for its use: *Ensminger* v. *People*, 47 Ill. 384; *Chicago* v. *Laflin*, 49 Id. 172; *The Kate Tremaine*, 5 Ben. 60; *Radway* v. *Briggs*, 37 N. Y. 256. The owner of a private wharf may allow others to use it and charge a compensation therefor, or he may use it for his own business to the exclusion of others: *The Volusia*, 3 Wall., Jr., 375. So, a municipal corporation owning improved wharves and maintaining them at its own cost, may charge and collect such compensation from parties using them as will be a fair and reasonable remuneration. *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100 Id. 430; *Packet Co.* v. *Keokuk*, 95 Id. 80. Such a provision is not in conflict with the Constitution of the United States. But a regulation by which vessels from another state are required to pay fees not exacted from domestic vessels, is invalid: *Guy* v. *Baltimore*, 100 U. S. 434.

In some cases wharfage has been allowed when no artificial improvements were made. "A wharf," says HEYDENFELDT, J., in *Sacramento Steamship New World*, 4 Cal. 41, "is, properly speaking, an artificial construction, and to such its meaning must be limited; but it does not follow that the definition of wharfage is to be confined to the charge for landing at a wharf. Words must be taken according to that most universal acceptation in common use, and so we find the term wharfage generally applied to a charge for landing goods, whether upon an artificial erection or a natural landing. See *Dubuque* v. *Stout*, 32 Iowa 80. But it may now be considered as settled that the proprietor of a wharf privilege must, in some manner, improve the shore or make preparations for the reception and delivery of goods, or the

accommodation of vessels, before he can collect toll or wharfage, otherwise he is only entitled to a reasonable compensation for the use of the river front. It was settled by *Cannon* v. *New Orleans*, 20 Wall. 579, that it does not lie within the power of a state or municipal corporation to impose a tax for the mere privilege of using the banks of navigable rivers for purposes of navigation. And in *New Orleans* v. *Wilmot*, 31 La. Ann. 65, it was said: "The only ground on which any sum can be claimed by the front proprietors from the owners of vessels for mooring at the banks of public navigable waters, and their discharging and receiving cargoes, is that such proprietor, by the expenditure of money and labor, has constructed and maintained works which facilitate the discharging and receiving of cargoes, and afford to vessels the means of mooring and remaining in security: *Railroad Co.* v. *Ellerman*, 105 U. S. 166; *Packet Co.* v. *Keokuk*, 95 Id. 88; *Mayor, &c., of St. Martinsville* v. *Steamer Mary Lewis*, 32 La. Ann. 1293; *Columbus* v. *Grey*, 2 Bush 476; and see *dictum* of Chief Justice WRIGHT in *Muscatine* v. *Hershey*, 18 Iowa 39.

Kennedy v. *Covington*, 17 B. Mon. 567, grew out of the conflicting claims of the owner of a ferry franchise and the city. The city of Covington extended to the river, and the strip of land next to the river was held in trust for the use of the city, and also for the use of the owners of the ferry franchise. It was acknowledged that the city had the right to erect wharves on the strip of ground referred to, or to use it in any manner calculated to promote the prosperity of the city or the convenience of its inhabitants, not inconsistent with the exercise of the ferry franchise belonging to the plaintiff. The owners of the ferry franchise claimed that they had a right to land at the city wharf, as an incident to their ferry franchise, without being required to pay wharfage. SIMPSON, J., observes: "It is a well-settled principle of law that every owner of property shall use and exercise the rights incident thereto so as not to interfere with the rights and privileges which belong to other persons. Now, in this case, both the parties have rights which attach to the same property, one of them the right to use it as a ferry landing, the other to use it for the benefit of the city and the convenience of its inhabitants. To the full enjoyment of the right which belongs to the city, the grading and paving of the landing, and the construction of the wharves is indispensably necessary. For the accomplishment of this object a considerable expenditure of money is required, and by the accomplishment the interest of both parties is evidently promoted. The construction of wharves increases the business, the prosperity and the growth of the city, and thereby contributes to the enhancement of the value of the ferry property, by a corresponding increase of its business. As, therefore, the city is compelled to incur a large expenditure to enable her to have the full enjoyment of her rights in the common property, and as it operates to the advantage of both parties, every principle of equity and justice requires that the owners of the ferry, if they use the improvements, should be made liable in some form or other, to contribute their rateable proportion to the cost of the construction. This liability cannot, however, authorize the city to subject them to the payment of regular wharfage. Such a charge might materially diminish the value of the ferry franchise. * * * We have, however, concluded that they ought to pay one-half the cost of constructing so much of the wharf at the foot of Scott street, as is necessary for the convenient landing of their boats and the passengers therein, and which they have been using for that purpose."

A city authorized to collect wharfage "for any vessel lying at anchor within any slip," cannot maintain an action for wharfage against a vessel attached to an

adjacent pier, even though it occupies the greater part of the slip between the pier. A vessel is not lying at anchor within the meaning of the statute when it is fastened to a pier: *Walsh* v. *N. Y. F. & D. Co.*, 77 N. Y. 448.

When a vessel alongside of a public wharf or pier is accidentally burned without fault of the owner, and sinks near the mouth of the slip, thus obstructing the slip or bulkhead so as to prevent other vessels from coming in, those entitled to wharfage cannot recover for the loss occasioned thereby without first showing that the owner of the vessel could, with proper care and diligence, have removed the wreck so as to prevent its being a cause of injury: *Hancock* v. *The York &c., Railway*, 10 Com. B. 349. And as such piers and bulkheads are open to the common use of the public for any purpose connected with the loading, unloading or repairing of vessels and securing their cargoes, whether in vessels afloat or sunk, when not prohibited by statute or ordinance, their use in attempting to raise the vessel and recover the property when it neither incommodes the loading or unloading of vessels, or the passing or repassing of carts, nor in any way injures the structure itself, gives no right of action for wharfage: *Taylor* v. *Atlantic Mutual Ins. Co.*, 2 Bosw. 106. The lessee of a public wharf is entitled to the wharfage accruing thereat, but the public character of the wharf is in no manner changed. Vessels resorting to it are still subject to the same general rules regulating the use of public wharves and slips: *Commissioners of Pilots* v. *Clark*, 33 N. Y. 251. The diminution of the trade and consequently of the value of a wharf other than by the act of the lessor, is not an interference with the right to collect wharfage. Thus, A. leased from a city a wharf for a certain period, the city binding itself for indemnity if the "right to collect wharfage was suspended for any period by the intervention of third parties." It was held that a diminution of trade on the river caused by the rebellion, did not interfere with his right "to collect," and hence he had no claim for indemnity from the city. The same lease provided "that in case the right to collect wharfage or rents should be defeated permanently through the instrumentality or aid of the mayor and council of the city," and it was held that his right was not defeated within the meaning of the clause by an ordinance which the lessee himself caused to be passed, nor by a tax other than wharfage, which the city had a right to lay, or by a quarantine embargo laid with lessee's consent: *Marshall* v. *Vicksburg*, 15 Wall. 146. Where freight is carried from wharf A. over wharf B., the owner of wharf B. can collect wharfage at the same rate as though the original delivery had been upon his wharf: *The J. H. Starin*, 15 Blatch. 473; s. c. Supplement to 45 Conn. 585; *Union Wharf Co.* v. *Hemingway*, 12 Id. 293. A wharf-owner may charge a higher rate of wharfage when the goods are removed from the wharf by means of drays, than when it is taken away in lighters or other vessels, thus allowing for the wear and tear of the wharf: *Soule* v. *San Francisco Gaslight Co.*, 54 Cal. 241. And in London, it is said that wharfingers are not entitled to wharfage for goods unladen into lighters out of barges fastened to their wharves: *Stephen* v. *Coster*, 3 Burr. 1408. A wharfinger, no less than a common carrier, may make what contract he pleases as to his compensation. But, like the keeper of a tavern or warehouse, if he gives notice in advance of his rates of charges, his customer cannot, after having assented to the proposed charges by using the wharf, refuse to pay on the ground that it is more than a reasonable compensation: *Southern Steamship Co.* v. *Sparks*, 22 Texas 657. So, after a party has used a public wharf which a city is authorized to establish, improve and regulate, and charge a moderate fee for expenses incurred, he

cannot refuse payment of wharfage on the ground that it has not been well built and is in need of further improvements. "This is not the way to try the question whether municipal corporations have performed public duties. A mandamus would, perhaps, lie to compel the borough to provide adequate facilities of wharfage; or an injunction at the suit of some agent of the public to restrain them from collecting fees for inadequate performance. In either of the modes the question would be tried and for all parties interested. But each individual customer cannot raise the question as a defence to charges he has voluntarily incurred. If he does not like the facilities furnished, he need not use them, but if he uses them, he must pay for them, so long as the power of assessment vested in the borough is not abused:" *Prescott* v. *Duquesne*, 48 Pa. St. 118, per WOODWARD, C. J.; also *Jeffersonville* v. *Ferry Co.*, 27 Ind. 100; s. c. 35 Ind. 19; *Winpenny* v. *Philadelphia*, 65 Pa. St. 135.

The *amount* of wharfage may, of course, be regulated by the legislature: *Baltimore* v. *White*, 2 Gill. 444; *Murphy* v. *City Council*, 11 Ala. 586. But where the right to impose wharfage is given to a municipality, the amount is a matter entirely at its discretion, and cannot be interfered with by the courts unless it is plainly unreasonable. 1 Dillon Mun. Corp., sect. 112; *Municipality* v. *Pease*, 2 La. Ann. 538; *Muscatine* v. *Hershey*, 18 Iowa 39, 42.

"The government of the municipality has determined that the rates of wharfage are due as such; from this the state has not dissented. The responsibility of the act rests entirely with the municipal government. The consequences of the interference of the judiciary in the details of its finances can be readily foreseen. * * * If the wharfage is a tax on commerce, or on imports or exports, it is unconstitutional, however small the amount. If it be not *per se* unconstitutional, the unconstitutionality depending according to the argument on the unreasonableness of the amount, the action of the judiciary is brought directly in conflict with the municipal power on an administrative question, over which it must be conceded the city government is called upon to exercise, to a certain extent, discretionary power. The judiciary action is put forth in favor of absolute, positive, legal rights, they must be separated by a distinct line of demarkation from those which are subject to the action of other branches of the government, the interference with which must be avoided:" *Municipality* v. *Pease*, *supra*. As to what is a sufficient compliance with a statute requiring a a demand of wharfage before an action can be brought, see *The Bark Francesca*, 9 Ben. 34.

V. The owner of a wharf on a navigable river is entitled to free access thereto without unnecessary obstructions by the acts of other parties: *D. R. S. C. Co.* v. *B. & B. S. F. Co.*, 81 Pa. St. 103. Hence, a raftsman upon a navigable river, although entitled to use it for the passage of his rafts or other water crafts, must do so with due regard to the rights of others. He must not moor his rafts so as to interfere with the rights of a riparian owner to bring boats to his own wharf, and in case a raft is so moored and left in charge of no one, the owner of the wharf may lawfully untie it and allow it to float away: *Harrington* v. *Edwards*, 17 Wis. 536; and see *Dutton* v. *Strong*, 1 Black 23. So a pier projecting in front of a wharf may be used in such a manner as to entitle the wharfinger to damages, as being an injury to his rights: *Camden & R. R. Co.* v. *Finch*, 5 Sandf. 48. So a city cannot obstruct a private wharf by turning the course of a stream of water so as to cause sand and earth to form an embankment in front of the wharf, thus preventing other vessels from approaching. "I cannot permit myself to doubt," says ARCHER, C. J., in *Barrow* v.

Mayor, &c., of Baltimore, 2 Am. Jur. 204–207, "but that the character of the plaintiff's rights were such that he might well complain of any injury to them. He had the right which every man has to the benefits flowing from a navigable stream contiguous to his land. He had a right to pass and repass with his vessels. No man has a right to moor a vessel to his lands without his consent, and if he was in the habit of asking and receiving a compensation from owners of vessels for such consent, and has been deprived of this benefit and profit by this filling up of the navigable stream opposite to his lands, he has been deprived of an important privilege and been compelled to surrender it for the public benefit. He has been disseized, or more properly speaking, deprived of an easement appurtenant to his lands, which constitutes a great portion of its value. It would be in vain to guard with such vigilance the freehold itself, if the liberties and privileges appurtenant to it were not also subject to constitutional guardianship. Over the soil covered by the water, over the water itself, which belongs to the state, I need not say, he has no right; but he has a perfect right to the soil of the wharf itself, to the profits growing out of the depth of the navigable water attached to it, which are incident to the soil itself" See *Stetson* v. *Faxon*, 19 Pick. 147, where this case is approved, and also *Thayer* v. *Boston*, 19 Pick. 511; *Appeal of Bailey*, 9 Phila. 506; *Simpson's Appeal*, 77 Pa. St. 270. But a municipal corporation may construct sewers opening into the public docks, and use them in a reasonable manner for conducting and depositing therein refuse matter. If such deposits cause damages to the owner of a wharf by diminishing the depth of water about it, and thereby impair its use for the purpose for which it was constructed and had been used, causing inconvenience and injury different in kind from that sustained by the public, and not merely different in degree or extent, he may recover damages in a private suit for such injury. But unless the damage differs in kind from that sustained by other persons owning land on the harbor, no private action can be sustained. This is a familiar principle and supported by a host of decisions: See *Breed* v. *Lynn*, 126 Mass. 218; *Blackwell* v. *Old Colony Railroad*, 122 Mass. 12; *Brayton* v. *Fall River*, 113 Mass. 218; *Huskell* v. *New Bedford*, 108 Mass. 208; *Franklin Wharf* v. *Portland*, 46 Maine 42; *President, &c., of Harvard College* v. *Stearns*, 15 Gray 1; *Brightman* v. *Fairhaven*, 7 Gray 271; *Smith* v. *Boston*, 7 Cush. 255; *Greasly* v. *Codling*, 2 Bing. 262; *Wilkes* v. *Hungerford Market*, 2 Bing. N. S. 281; *Daugherty* v. *Bunting*, 1 Sandf. 1. Nor will the fact that the plaintiff alone navigates the stream, or has a wharf thereon, show more than that he may suffer in a greater degree than others: *Blackwell* v. *Old Colony R. R. Co.*, 122 Mass. 1.

The owner of land adjacent to the shore of a navigable river who obtains from the commissioner of the land office a grant of land under water, on which, after filling in, he rests a wharf, cannot maintain an action on the case against the agent of a company to whom the legislature afterwards granted the privilege of erecting a pier in the river for the purpose of constructing a basin for the protection aud safety of boats, and who erects such pier entirely encompassing the wharf on the side of the water so as to leave no communication between it and the river, except through a lock at one extremity of the basin. By authorizing the commissioner of the land office to make the grant, the legislature did not preclude itself from making a great public improvement for the benefit of commerce, nor was it taking private property for public use, nor a violation of any contract, express or implied, on the part of the state. The loss sustained

by the wharfinger in consequence of the building of the pier or the construction of the basin was *damnum absque injuria*, for which no action lies: *Lansing* v. *Smith*, 4 Wend. 9.

In *Bainbridge* v. *Sherlock*, 29 Ind. 364, it was held that a wharf-boat when moored to the shore is entitled to the same immunity from trespass as the land itself. And a navigator landing at one wharf is not justified by any public right in the river, in so landing and mooring his vessel that while landed its side and stern will be carried by the current against the wharf-boat of a contiguous wharfinger, lower down the river, thus obstructing access to the lower wharf. But this case was again considered in 41 Ind. 35, and a somewhat modified conclusion reached. It was there held, that the appellees had the right to run their boat in any part of the river not then occupied by other boats or crafts navigating the river, and to stop at any wharf which their business might require. "The appellee's wharf or wharf-boat," says WORDEN, J., "is clearly entitled to no greater immunity as against a person navigating the river, than if it had been a floating craft navigating the river, in which event, in case of collision, wilfulness, negligence, or want of skill, would be necessary in order to hold a party responsible. * * * We have already seen that the appellee, whatever may have been the extent of his title to the soil, had no right to so construct or use his wharf as to interfere with the paramount right of the public to the free use of the river as a common highway. The appellants had the legal right to navigate the river, and every part thereof, and to stop at such wharves as their business might require. And if in doing so, they by a portion of the length of their boat, occupied the water in front of the appellee's wharf, they were but exercising a legal right and could not in so doing be trespassing. The appellee was not, in our opinion, entitled 'to the free use of all the adjacent waters near to and in front of his wharf-boat,' as against parties temporarily occupying the same, in due course of the navigation of the river. Such a right in the appellee would be utterly inconsistent with the right of the public to the use of the river as a common highway. The appellants had the right to land at such wharf or wharves as suited their convenience, and if in doing so, the current of the river, or rather circumstances carried the stern of their boat down stream so that a portion of the boat's length lay in front of the appellee's wharf, but still in the navigable waters of the river, they were but in the exercise of a legal right, and cannot be responsible to the appellee for any consequential damages which he may have sustained by others being thereby prevented from landing at his wharf; provided, that the appellants in thus exercising their rights, exercised due care, skill and dispatch, and subjected the appellee to as little inconvenience as possible, consistently with the exercise of their own rights. Doubtless unreasonable and vexatious delay, thus wrongfully preventing ingress to and egress from the appellee's wharf, would subject the appellants to liability for the damages consequent thereon."

A wharfinger not only has the right to bring an action and recover damages for any injury actually done to his wharf, but he is also entitled to the benefit of equitable remedies for the prevention of injnries to his rights: *People* v. *Davidson*, 30 Cal. 379; *Parker* v. *Taylor*, 7 Or. 435 (and see this case as to the rights of riparian owners in Oregon). Thus a court of equity will interfere to prevent injury to a private wharf by the erection of permanent obstructions which interfere with ingress to and egress from a wharf: *Penniman* v. *N. Y. Balance Co.*, 13 How. Pr. (N. Y.) 40; or to prevent a municipal corporation from interfering with the rights of the owner of a private wharf by appropriating an adjoining

slip to the purposes of a public wharf: *Murray* v. *Sharp*, 1 Bosw. 539; or the construction of another wharf in front of one already constructed: *Cowell* v. *Martin*, 43 Cal. 605; *Crocker* v. *Mayor of New York*, 15 Fed. Rep. 405. But on the other hand, a mandatory injunction will not issue to compel the owners of a private wharf to allow wharfage facilities to a particular person as well as others, when they have only exercised a reasonable discretion in excluding him on account of the extent of their business: *Audenried* v. *Phila. & Reading R. R. Co.*, 68 Pa. St. 370, s. c. 8 Am. R. 195.

VI. The right to collect wharfage carries with it the correlative duty of keeping the wharf in repair. So long as a wharf is open to the public, it is the duty of those having control of it to keep it in a reasonably safe condition: *Radway* v. *Briggs*, 37 N. Y. 256; *Wendall* v. *Baxter*, 12 Gray 494; *Pittsburgh* v. *Grier*, 22 Pa. St. 54; *Eastman* v. *Meredith*, 36 N. H. 284; *Jeffersonville* v. *Louisville, &c., Ferry Co.*, 27 Ind. 100; *Harrison* v. *Municipality*, Mass. 216; *Carleton* v. *Franconia Iron and Steel Co.*, 99 Mass. 216; *Swords* v. *Edgar*, 59 N. Y. 28; *Parnaby* v. *Lancaster Canal Co.*, 11 A. & E. 223; *Metcalfe* v. *Hetherington*, 11 Ex. 257, 5 H. & N. 719; *Gibbs* v. *Mersey Docks*, 3 H. & N. 164; L. R., 1 H. of L. Cas. 93; *Longmore* v. *Great Western R. R. Co.*, 35 L. J. C. P. 135; *Francis* v. *Cockrell*, L. R., 5 Q. B. 184; *Webb* v. *Port Bruce Harbor Co.*, 19 U. C. Q. B. 626; *Coe* v. *Wise*, L. R., 1 Q. B. 711; *Winch* v. *Conservators of the Thames*, L. R., 7 C. P. 471. As to the duty of keeping pier lights, see *Sweeney* v. *Port Burwell Harbor Co.*, 17 U. C. C. P. 574, reversed in 19 U. C. C. P. 376.

A legal transfer of the right to collect wharfage to a third party subrogates that party to the duty of keeping the wharf in repair. Thus the lessee of a wharf was held liable for the value of a horse, cart and load of merchandise, lost by backing off the wharf into the water, where there was no suitable guard: *Railway* v. *Briggs*, 37 N. Y. 265. But where, at the time the lease was made and the delivery of possession, the wharf was in a defective and unsafe condition, and in consequence thereof, while in the possession of the lessee, an injury happened to one lawfully thereon, it was held that the lessor, who was receiving a benefit by way of rent, was liable for the damage: *Swords* v. *Edgar*, 59 N. Y. 28; and see *Louisville* v. *Bank of the United States*, 3 B. Mon. 144. *Wendell* v. *Baxter*, 12 Gray 494, was a case where the plaintiff was injured while in the employ of the lessee of a wharf. The following instructions given by the court below were held not error on appeal. The jury were instructed "that if they were satisfied that the defendants had established the wharf for the use of the public, and invited the public to use it for a reasonable compensation, they were bound to keep the wharf safe for the use for which it was made and erected at that place; that if the plaintiff, being properly on the wharf, in the prosecution of his business, and in the exercise of reasonable care and diligence, sustained the injury alleged, through a defect in the wharf, he was entitled to recover, unless the defect was latent, and so hidden and concealed that it could not be discovered by such examination and inspection as the construction, use and exposure of the wharf reasonably required; that if the defendants knew that causes rendering the wharf unsafe, were constantly or occasionally in operation, which they could, by the exercise of ordinary diligence and care, have anticipated and provided against, they were required to do so." See also *Mayor* v. *Henley*, 3 B. & Ad. 92. In *Eastman* v. *Meredith*, 36 N. H. 284, 295, PERLEY, C. J., in speaking of *Pittsburgh* v. *Grier*, 22 Pa. St. 54, said: "This case is put distinctly upon the

ground that the public duty, which was the foundation of the action, rose out of the control which the city exercised over the wharf, and the income received from the use of it." The right of action arises from the duty which the law imposes upon the owners of wharves to keep them in proper repair, and not from any contract between the wharf-owner and the customer: *Callett* v. *London and Northwestern Railroad*, 11 Ad. & El. N. S. 984, 989; *Wendell* v. *Baxtex*, 12 Gray 494; *Mayor, &c.*, v. *Henley*, 3 B. & Ad. 92; *Buckbee* v. *Brown*, 21 Wend. 110.

A city is liable for any damages caused by a failure to provide proper fastenings to a public wharf: *Shinkle* v. *Covington*, 1 Bush 617; *People* v. *Albany*, 11 Wend. 539; *Buckbee* v. *Brown*, 21 Wend. 110; *Mercer Dock Trustees* v. *Gibbs*, L. R., 1 H. of L. Cas. 93. Although the owner of a wharf is not bound to keep a sufficient depth of water at all times to accommodate all sized vessels, it is his duty to give imformation of inequalities of the water when necessary to protect vessels about to land: *Nelson* v. *Phœnix Chem. Works*, 7 Ben. 37. And he will be responsible for any damage caused by such inequalities, to vessels, while lawfully and with due care occupying his wharf: *Barrett* v. *Black*, 56 Me. 498; *Sawyer* v. *Oakman*, 7 Blatch. 290; *Carleton* v. *Franconia Iron Co.*, 99 Mass. 216; and see *Wendell* v. *Baxter*, 12 Gray 494; *Sweeny* v. *Old Colony and N. R. R. Co.* 10 Allen 368; *Elliott* v. *Pray*, 10 Allen 378; *Barnaby* v. *Lancaster Canal Co.*, 11 A. & E. 223; *Gibbs* v. *Trustees, &c.*, 3 H. & N. 164; *Indermaur* v. *Dames*, L. R., 1 C. P. 274; s. c. Id. 311; *Thompson* v. *N. E. R. R. Co.*, 2 B. & S. 106; *P. R. R. Co.* v. *P. S. Co.*, 11 A. & E. 223. But he is not liable for damages caused by delay, occasioned by an insufficiency of water in a berth: *The Bark Francesca*, 9 Ben. 34. MORTON, J., in *Nickerson* v. *Tirrell*, 127 Mass. 236, 229, says: "The general rules of law applicable in cases of this character are well settled. The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use ordinary care to keep his dock in such a state as to be reasonably safe for use by vessels *which he invites to enter it, or for which he holds it out as fit and ready*. If he fails to use such due care—if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby."

VII. The liability of a wharfinger for goods deposited on his wharf does not differ materially from that of a warehouseman. He must take reasonable common care of the property intrusted to him, and is liable for a corresponding degree of negligence, and the burden of proving such negligence is upon the party alleging it: *Foote* v. *Storrs*, 2 Barb. 326; *Schmidt* v. *Blood*, 9 Wend. 268; *Blin* v. *Mayo*, 10 Vt. 56; *Sidaways* v. *Todd*, 2 Starkie 357; Story on Bailment, sect. 452; *Cox* v. *O'Riley*, 4 Ind. 368. But a wharfinger must be distinguished from a common carrier. The language of Lord MANSFIELD, in *Ross* v. *Johnson*, 5 Burr. 2827, and of Lord ELLENBOROUGH in *Maving* v. *Todd*, 1 Starkie 72, favored the doctrine that wharfingers, like common carriers, were liable for all injuries except such as arise from the act of God or the public enemy. But this doctrine was ably combatted by Judge STORY, in his treatise on Bailments, and it is now settled by the decisions that he is liable only for the ordinary care required of a bailee for hire: *Platt* v. *Hibbard*, 7 Cow. 502;

Garside v. *Trent. Nav. Co.*, 4 T. R. 581; *Hyde* v. *Trent Nav. Co.*, 5 Id. 339; *In re Webb*, 8 Taunt. 443; *Roberts* v. *Turner*, 12 John. 232; *Brown* v. *Denison*, 2 Wend. 593; *Cogs* v. *Bernard*, 2 Ld. Raym. 909, 218; *Sidaways* v. *Todd*, 2 Starkie 351. But if he undertakes to convey the goods from the wharves to a vessel by his own lighter, he assumes the responsibility of a common carrier, and will be held liable as such: *Maving* v. *Todd*, 1 Starkie 59. The responsibility of a wharfinger begins when the goods are delivered on the wharf and he has expressly or impliedly received them into his care and custody: *Rodgers* v. *Stophel*, 32 Pa. St. 111; *Quiggin* v. *Duff*, 1 M. & W. 174; s. c. 1 Gale 420. But a mere delivery at the wharf is not necessarily a delivery to the wharfinger. Some act of assent, either on his part or by his agent, to the custody thereof, is necessary before he will be presumed to have assumed the character of custodian: *Buckman* v. *Levi*, 3 Camp. 414; *Gibson* v. *Inglis*, 4 Id. 72; *Blin* v. *Mayo*, 10 Vt. 56; *Packard* v. *Getman*, 6 Cow. 757.

His responsibility ceases as soon as he ceases to have the custody and control of the goods. Thus, where goods were delivered to a wharfinger to be sent on board a vessel, his responsibility ceased as soon as the goods were delivered to the proper officers of the vessel. And this, by the usage, although they remained upon the wharf: *Cobban* v. *Downes*, 5 Esp. 41; *Merrett* v. *O. C. and N. R. R. Co.*, 11 Allen 80; *Guss* v. *New York, &c., R. R. Co.*, 99 Mass. 227.

But a delivery to one of the crew of a vessel will not be sufficient. It must be to the captain or some one having authority to receive them: *Leigh* v. *Smith*, 1 C. & P. 638; R. & M. 224.

The usages of business in the vicinity are important to show when a wharfinger acquires and when he ceases to have the custody of goods. "By the usages and customs of business is not understood to be meant such customs, as from their continuance have become part of the common law, but such customs and usages as are generally regarded and adopted by the persons doing business in the vicinity, and with reference to which contracts are made. The evidence of the customs and usages of the merchants in the vicinity of defendant's wharf was properly received to show that goods landed on the wharf * * * were not considered as in their custody and that they did not receive and take care of them as wharfingers:" *Blin* v. *Mayo*, *supra*. Where the goods are demanded by the proper owner and all charges paid, or tendered, they must be delivered. But if notified that the goods in his possession bear a spurious trademark, and that their sale will be enjoined, and he is requested not to deliver them, he may lawfully withhold them: *Hunt* v. *Maniere*, 34 Beav. 157; 13 W. R. 212; 11 L. T. (N. S.) 469. If he detains goods and the owner afterwards agrees to accept them, and actually removes a part, he is not liable for the destruction of the balance remaining on the wharf after the owner has had a reasonable time to remove it: *Carnes* v. *Nichols*, 10 Gray 369. A wharfinger is not estopped from denying the title of his bailor: *Thorne* v. *Tilbury*, 3 H. & N. 534; 27 L. J. Exch. 407. See *Biddle* v. *Bond*, 34 L. J. Q. B. 137. But where the wharfinger had once acknowledged certain goods to be the property of the plaintiff, it was held that he could not dispute plaintiff's title in an action of trover brought against him: *Gosling* v. *Birnie*, 7 Bing. 339; M. & P. 531; *Hall* v. *Griffin*, 3 M. & Scott 732; 10 Id. 246.

VIII. As an incident to the wharfinger's agreement, either express or implied, to properly care for goods left in his charge, he is entitled to the possession of them until delivery is demanded and due compensation made. Thus he has a special interest in the goods which the law

will protect. Such interest is an insurable one and will be included in a policy covering "goods in trust." In case of loss he can recover the full amount, but will be liable over for any excess above his charges. He may at his own cost and without notice to the owners, keep a floating policy for the benefit of all who may become his customers: *Waters* v. *Monarch F. & L. Ins. Co.*, 5 El. & B. 870; 2 Jur. (N. S.) 375; 25 L. J. Q. B. 102. See *Ex parte Bateman*, 2 Jur. (N. S.) 265; 25 L. J., Eq. 19; 8 DeG. M. & G. 263.

IX. Like other depositaries for value, a wharfinger has a lien upon goods deposited upon his wharf, for the amount of his charges, and also by the general usage of the trade for his general balance of accounts: *Naylor* v. *Mangles*, 1 Esp. 109, per Lord KENYON; *Spears* v. *Hartly*, 3 Id. 81; *Rushforth* v. *Hadfield*, 6 East 519; 7 Id. 224; *Holdermess* v. *Collinson*, 7 B. & C. 212; 2 Kent's Com. (12 ed.) 642. But it has been said that a custom to extend a lien for wharfage to all claims which the wharfinger may have against the owner of goods is invalid: *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99; *Brookman* v. *Hamill*, 48 N. Y. 554. Nor has he any general lien in respect to the labor and warehouse room, except by agreement, express or implied, but a general, continued and undisputed usage is evidence of an agreement: *Holderness* v. *Collinson*, 7 B. & C. 212. Nor can he claim a lien on the goods of one owner, the identity of which was not lost in a fire, from which the whole were saved: *Grant* v. *Humphery*, 3 F. & F. 162. The wharfinger's lien will prevail over legal process against the owner of the goods if it attached prior to the *teste* of such process: *Rex* v. *Humphery*, McC. & Y. 178. A wharfinger has a double remedy for his wharfage, a lien on the article and a personal lien or claim on the owner. If the owner sells and a delivery order is handed to the wharfinger, with a tender of the wharfage, there is no further claim against the vendor, but the personal claim attaches to the vendee, on the ground that the wharfinger is no longer liable to the vendor for the safe keeping of the article, and therefore, has no claim on him, but the wharfinger's liability and claim passes over to the vendee. After a sale of the goods and a tender of the wharfage already due, with proper notice, the vendor is discharged from liability for future wharfage. The notice may be given verbally or by a delivery order: *Wooster* v. *Blossom*, 5 Jones (N. C.) Law 244; *Sage* v. *Gittner*, 11 Barb. 120; *Barry* v. *Longmore*, 12 A. & E. 642; Story on Bailments, sect. 452. A wharfinger has no power to sell merchandise deposited on his wharf, and for which he is entitled to a compensation in the shape of wharfage for its safe keeping, though accustomed to sell property of the same description from the wharf: see *Monk* v. *Whittenburg*, 2 B. & A. 484; *Wilkinson* v. *King*, 2 Camp. 335; *Kusenburg* v. *Browne*, 42 Pa. St. 173.

A wharfinger has a lien on a vessel for wharfage. *Ex parte Easton*, 95 U. S. 68, was a suit in the nature of a libel *in rem* brought by the owner of a wharf in New York, against a barge coming from Baltimore, to recover the charges alleged to be due libellant as wharfage. It was contended that process could not issue against the barge because no maritime lien arose in the case. In the course of the decision, Mr. Chief Justice WAITE said that wharf accommodations are a necessity of commerce and indispensable for ships and vessels, and water-crafts of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable water-crafts to lie in port safely, and to facilitate their operations in loading and unloading their cargoes, and in receiving and landing passengers. Piers and wharves are a

necessary incident to every well regulated port, without which commerce and navigation would be subjected to great inconveniences and exposed to vexations and constant peril. Conveniences of this kind are wanted both at the port of departure and of entry, and the expenses paid at both are everywhere regarded as properly chargeable as expenses of the voyage. Such erections are indispensably necessary for the safety and convenience of commerce and navigation, and those who take berths alongside of them to secure those objects derive great benefit from their use. And experience supports the proposition, and shows to a demonstration that the contract of a wharfinger appertains to the pursuit of commerce and navigation. Standard authorities as well as reason, principle, and the necessities of commerce, support the theory that the contract for wharfage is a maritime contract, which in the case supposed, gives to the proprietor of the wharf a maritime lien on the ship or vessel for his security; "viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed, arises in favor of the proprietors of the wharf, against the vessel, for payment of reasonable or customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner." *Johnson* v. *McDonough*, Gilpin 101; *The Phœbe*, Ware 265; *The Kate Tremain*, 5 Ben. 60; *The Maggie Hammond*, 9 Wall. Jr. 435; *Dalvie* v. *Booth*, 2 Gall. 398; *Gardiner* v. *Ship New Jersey*, 1 Pet. Adm. 223, per Judge STORY; *Bark Alaska*, 3 Ben. 391; *Hoburt* v. *Drogan*, 10 Pet. 108; *The Mercer*, 1 Sprague 284; *The Ann Ryan*, 7 Ben. 20; Dunlop's Adm. 65; Abbott's Ship, 423; 2 Conk. Adm. 515. But see *The Barge John M. Welch*, 9 Ben. 507. As to liens under a statute, see *The Virginia Rulon*, 13 Blatch. 519; *The Lottawanna*, 21 Wall.. 558; *The Steamer St. Lawrence*, 1 Black 529.

CHARLES BURKE ELLIOTT.

St. Louis.

Supreme Court of Michigan.

WOOD v. LOSEY.

An infant sued for the price of goods does not have the burden of showing that they were not necessaries. The plaintiff cannot make out his case without showing that the goods purchased were necessaries, notwithstanding that defendant assumes the burden of showing them not to be necessary.

An infant sued for the price of a horse sold to him showed that his sole business was to carry on his mother-in-law's farm for one-third of the produce, and that she was to furnish all the teams, tools and implements: *Held*, that this showed that the horse was not a "necessary" for which he was liable; and it was error to give the jury to understand that it was the necessity of the horse to the farming business, instead of to his part in it, that fixed his liability.